MOTION FILED

JUN 8- 2009

No. 08-1375

In the Supreme Court of the United States

CASSENS TRANSPORT COMPANY, CRAWFORD & COMPANY, AND DR. SAUL MARGULIES,

Petitioners,

v.

PAUL BROWN, WILLIAM FANALY, CHARLES THOMAS, GARY RIGGS, ROBERT ORLIKOWSKI, AND SCOTT WAY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

MOTION OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, the American Trucking Associations, Inc. ("ATA") moves for leave to file the accompanying brief as *amicus curiae* in support of the petitioners. Counsel for petitioners has consented to the filing of this brief, but counsel for the respondents has withheld consent.

ATA is a nonprofit corporation incorporated under the laws of the District of Columbia, with its principal place of business in Arlington, Virginia. ATA is the national trade association of the trucking industry. It has approximately 2,000 direct motor carrier members and, in cooperation with state trucking associations and affiliated national trucking conferences, ATA represents tens of thousands of motor carriers. ATA was created to promote and protect the interests of the trucking industry, which consists of every type and geographical scope of motor carrier operation in the United States, including for-hire carriers, private carriers, leasing companies and others. ATA regularly advocates the trucking industry's position before this Court and other courts.

This case raises important and recurring questions concerning the scope of the McCarran-Ferguson Act, which was enacted to prevent inadvertent federal regulation that impairs insurance regulation by the States. In the decision below, the Sixth Circuit ruled that the Act does not bar a civil action brought under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*, seeking to recover not only treble damages but also attorneys' fees based on an employer's allegedly fraudulent refusal to pay benefits under a state workers' compensation scheme. If left uncorrected, the decision below could seriously disrupt

the proper functioning of state workers' compensation schemes in the Sixth Circuit and elsewhere, make self-insurance a far less desirable option, and severely weaken the protections afforded by the McCarran-Ferguson Act. Because ATA's members have a substantial interest in avoiding all of these deleterious effects, *amicus* has a strong interest in ensuring that review is granted in this case and the Sixth Circuit's flawed decision is corrected.

ATA's motion for leave to file the accompanying brief as *amicus curiae* should be granted.

Respectfully submitted.

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BRIEF FOR THE AMERICAN TRUCKING ASSOCIATIONS, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*[1]

The interest of the *amicus curiae* is described in the accompanying motion for leave to file this brief.

STATEMENT

The case presents two questions of substantial importance concerning the meaning of the McCarran-Ferguson Act ("McCarran Act"), 15 U.S.C. § 1011 *et seq.* Specifically, the Sixth Circuit ruled that respondents' effort to use the battering-ram of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO"), to challenge an employer's denial of workers' compensation benefits was not precluded by the McCarran Act because (1) Michigan's Workers' Compensation Act does not regulate the "business of insurance," and (2) the application of RICO would not "impair" the exclusive Michigan administrative scheme for resolving disputes over such benefits. *Amicus* agrees for all the reasons identified by petitioners that the Sixth Circuit's "business of insurance" ruling is flawed, will undermine the right of businesses to self-insure, and warrants this Court's review. That holding

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[1] Counsel of record for all parties received timely notice of the *amicus curiae*'s intent to file this brief. S. Ct. Rule 37.2(a). Pursuant to Rule 37.6 of the Rules of this Court, *amicus curiae* states that no counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to this brief's preparation or submission.

also overlooks this Court's teaching that state workers' compensation laws are, at bottom, "*a compulsory insurance system* requiring employers to compensate employees for work-related injuries without regard to fault." *American Mfrs. Mutual Ins. Co.* v. *Sullivan*, 526 U.S. 40, 44 (1999) (emphasis added).[2]

For reasons of space, however, *amicus* will focus on the lower court's second holding. As explained below, the Sixth Circuit's resolution of the "impairment" question independently warrants review because it is inconsistent with certain aspects of this Court's decision in *Humana, Inc.* v. *Forsyth*, 525 U.S. 299 (1999), provides a valuable opportunity to clarify other aspects of *Humana*, and, if left uncorrected, would threaten to disrupt the operation of state workers' compensation schemes across the country.

A. The McCarran Act

Before 1944, this Court had "consistently held that the business of insurance was not commerce." *Humana*, 525 U.S. at 306; see, *e.g.*, *Hooper* v. *California*, 155 U.S. 648, 654 (1895). As a consequence, for the first century and a half after the founding of the Republic the insurance industry was "largely immune from federal regulation." *Humana*, 525 U.S. at 306; see also *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S.

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[2] This Court's view is consistent with that of the leading treatise on workers' compensation law. See 1 A. LARSON & L. LARSON, LARSON'S WORKERS' COMPENSATION LAW, at 1-1 (2008) (characterizing workers' compensation as a type of insurance for "providing cash-wage benefits and medical care to victims of work-connected injuries, and for placing the costs of these injuries ultimately on consumers * * * in the cost of the product.") (emphasis added); *id.* § 1.03[7], at 1-12 (insurance is "an integral part of the whole scheme").

531, 539 (1978) ("[T]he States enjoyed a virtually exclusive domain over the insurance industry.").

In 1944, this Court abruptly changed course, ruling that a fire insurance company that conducted a substantial part of its transactions across state lines was engaged in interstate commerce – and subject to the Sherman Act. See *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). This decision "provoked widespread concern that the States would no longer be able to engage in * * * effective regulation of the insurance industry." *Barry*, 438 U.S. at 539. In response, Congress "moved quickly" to "restore the supremacy of the States in * * * insurance regulation" by enacting the McCarran Act in 1945. *Ibid.*

Section 1 of the McCarran Act declares that "continued regulation * * * by the several States of the business of insurance is in the public interest." 15 U.S.C. § 1011. Section 2(a) provides, in turn, that "the business of insurance * * * shall be subject to the laws of the several States which relate to the regulation or taxation of such business." *Id.* § 1012(a). Congress backed up Section 2(a)'s commitment to the primacy of state law in the field of insurance by broadly providing, in Section 2(b), that federal legislation not specifically related to the business of insurance shall not be "construed to *invalidate, impair, or supersede any* law enacted by *any* State for the purpose of regulating the business of insurance." *Id.* § 1012(b) (emphasis added). Section 2(b) thus "ensured that federal statutes not identified in the Act or not yet enacted would not automatically override state insurance regulation." *Humana*, 525 U.S. at 306.[3]

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[3] In interpreting the McCarran Act, this Court has instructed that

B. This Court's Decision in *Humana*

In *Humana* v. *Forsyth*, this Court examined the meaning of the critical, disjunctive terms of Section 2(b) of the McCarran Act: "invalidate," "supersede," or "impair." The case involved a private civil suit brought under RICO. The suit charged a group health insurer with engaging in a pattern of fraud whereby it received discounts for hospital services that it did not pass on to its policy beneficiaries. The plaintiffs sought treble damages as a remedy.

This Court narrowly ruled that "RICO can be applied *in this case* in harmony with" Nevada's laws governing insurance. 525 U.S. at 303 (emphasis added). In reaching that conclusion, the Court carefully examined the standard of conduct sought to be enforced, the procedural mechanisms, and the available remedies in the underlying RICO action, and compared them with those available under Nevada law. "The acts the policy beneficiaries identify as unlawful under RICO," the Court first explained, "are also unlawful under Nevada law." *Id.* at 308. Beyond that, the Nevada Unfair Insurance Practices Act, which sets forth an "administrative scheme that prohibits various forms of insurance fraud and misrepresentation," specifically authorizes a "private right of action" in the courts for those injured by insurance fraud. *Id.* at 311-12. And the Nevada Unfair Insurance Practices Act, the Court emphasized, "is *not hermetically sealed*; it

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the Act should "be read as protecting the right of the States to regulate what they traditionally regulated" – in particular, what Congress regarded (and the statute referred to) as the "business of insurance." *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 218 n.18, 221 (1979).

does not exclude application of other state laws, statutory or decisional." *Id.* at 312 (emphasis added). For example, the Court reasoned, Nevada *common law* also imposes an independent duty on insurers to deal with their policyholders fairly and in good faith, and it permits plaintiffs who bring suits for insurance bad faith to recover punitive damages awards that are exempt from the usual Nevada cap of three times compensatory damages. *Id.* at 313. "Accordingly," the Court reasoned, "plaintiffs seeking relief under Nevada law may be eligible for damages *exceeding* the treble damages available under RICO." *Ibid.* (emphasis added).

In addition to very carefully analyzing Nevada law and comparing it to RICO, the Court parsed the text of Section 2(b) of the McCarran Act. "Impair," the Court explained, means "'to weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner.'" 525 U.S. at 309-10 (quoting BLACK'S LAW DICTIONARY 752 (6th ed. 1990)). The Court drew support from *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 102 (1983), a preemption case, which concluded that to "'impair' a law is to hinder its operation or 'frustrate [a] goal' of that law." 525 U.S. at 311. In light of this broad definition of "impair," the Court in *Humana* firmly rejected the notion that "impair[ment]" requires a direct conflict between the federal and state provisions. *Id.* at 309 (Congress did not intend "a green light for federal regulation whenever the federal law does not collide head on with state regulation").

Based on the foregoing analysis, the Court distilled the essence of Section 2(b) into this formula: "When federal regulation does not directly conflict with state

regulation, and when application of the federal law would not [1] frustrate any declared state policy or [2] interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application." 525 U.S. at 310 (emphasis added). Applying this two-part formulation, the Court concluded that there was "no frustration of state policy in *the RICO litigation at issue here*" (525 U.S. at 313 (emphasis added)), which sought to apply the same standard of conduct, in the same procedural setting (a private lawsuit), as Nevada law would provide, and which sought a remedy that was less than what a Nevada court (or jury) could award.

C. The Michigan Workers' Compensation Act

Today most States have in place detailed workers' compensation schemes that originated in the first two decades of the twentieth century – long before the McCarran Act was enacted, at a time when States "enjoyed a virtually exclusive domain over the insurance industry." *Barry*, 438 U.S. at 539; see also I A. LARSON, *supra*, § 2.08, at 2-15; L. FRIEDMAN, AMERICAN LAW IN THE 20TH CENTURY 352-55 (2002). Michigan's workers' compensation system, which dates back to 1912, is typical in its objective of "replac[ing] the common-law system" for recovering compensation in the courts for job-related injuries "with a compulsory insurance system requiring employers to compensate employees for work-related injuries without regard to fault." *Sullivan*, 526 U.S. at 44; see also WORKERS' COMPENSATION AGENCY, MICHIGAN DEPT. OF LABOR & ECON. GROWTH, AN OVERVIEW OF WORKERS' COMPENSATION IN MICHIGAN 2 (2006) ("OVERVIEW").

Toward that end, the Michigan Workers' Compensation Act ("MWCA") abolishes the employer's tradi-

tional common-law defenses of contributory negligence, assumption of risk, and the "fellow servant" rule, and imposes an obligation on employers to compensate workers for any injuries suffered on the job, without regard to fault. OVERVIEW, at 3; MICH. COMP. LAWS §§ 418.141, 418.301; see also Pet. 4-5. At the same time, and "[i]n return for this almost automatic liability, the [MWCA] limited the amount that a worker could recover * * * to (1) certain wage loss benefits, (2) the cost of medical treatment, and (3) certain rehabilitation services." OVERVIEW, at 2; see also MICH. COMP. LAWS §§ 418.301 to 481.391. "Under the old system," in contrast, " workers had been able to recover for pain and suffering, loss of enjoyment of life, and other damages that a jury might award." OVERVIEW, at 2.

The Michigan scheme makes clear that, with certain exceptions not relevant to this case, "the right to the recovery of benefits as provided in [the MWCA] shall be the employee's *exclusive remedy*" for a non-intentional workplace injury. MICH. COMP. LAWS § 418.131(1) (emphasis added); see also *id.* § 418.841(1). The statute sets up a detailed administrative scheme for resolving disputes over the denial of workers' compensation claims through mediation, arbitration, or administrative hearings, including the right to take appeals to the Workers' Compensation Appellate Commission. OVERVIEW, at 31-35; MICH. COMP. LAWS §§ 418.841, 418.847 to 418.867; see also L. FRIEDMAN, *supra*, at 354-55 ("the new system did not operate through courts, but administratively; it was supposed to work quickly, almost automatically, without muss or fuss"). Significantly, under Michigan law it is clear that this administrative scheme – with its carefully limited remedies and streamlined procedures – also provides the exclusive remedy for a claim

that workers' compensation benefits were wrongfully withheld from an employee. See Pet. 26-28; MICH. COMP. LAWS § 418.841(1) ("Any dispute or controversy concerning compensation or other benefits shall be submitted to the [B]ureau [of Workers' Compensation] and all questions arising under this act shall be determined by the bureau or a workers' compensation magistrate, as applicable.").

The MWCA also contains detailed provisions relating to the security and funding of workers' compensation benefits, including the requirement that employers either obtain workers' compensation insurance or self-insure. See MICH. COMP. LAWS § 418.611, 418.621; Pet. 5-6.[4] It also authorizes a state agency, the Bureau of Workers' Compensation, to administer the system and to impose penalties on employers for, among other things, failing to pay benefits that are owed. See MICH. COMP. LAWS §§ 418.201-418.205, 418.801(2) (penalties, capped at $1500, for nonpayment of benefits).

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[4] Employers favored the adoption of workers' compensation schemes not only because they limited recovery and replaced expensive litigation with streamlined administrative processes, but also because they addressed the serious problem of the rapidly rising cost of employer's liability insurance. Fishback & Kantor, *The Adoption of Workers' Compensation in the United States, 1900-1930*, 41 J. L. & ECON. 305, 317-18 (1998). Insurance companies "also stood to gain from" and thus supported "the passage of workers' compensation schemes" because these laws "compelled employers to insure their entire payrolls." *Id.* at 310. The Michigan statute includes extensive provisions relating to how the scheme will be funded through insurance and other risk-pooling measures. MICH. COMP. LAWS §§ 418.501, 418.611, 418.621; see also Pet. 5-6, 21-23.

D. The Proceedings Below

1. Respondents are six current or former employees of Cassens Transport Company. After their claims arising out of alleged workplace injuries for workers' compensation benefits under Michigan law were denied, respondents brought a RICO lawsuit against petitioners Cassens, Crawford & Company (which had contracted with Cassens to provide claims adjustment services), and Dr. Saul Margules (a physician who examined some of the respondents concerning their entitlement to benefits). Pet. App. 2a-3a, 33a. In their RICO claim, respondents alleged that petitioners had employed wire and mail fraud in a scheme to deny them workers' compensation benefits under the MWCA. Specifically, respondents alleged that "Cassens and Crawford deliberately selected and paid unqualified doctors, including Margules, to give fraudulent medical opinions, and * * * ignored other medical evidence in denying them benefits." *Id.* at 3a. Respondents sought treble damages and attorneys' fees.

2. The district court granted petitioners' motion to dismiss the RICO claim pursuant to Fed. R. Civ. P. 12(b)(6). Pet. App. 3a, 32a-33a. Among other things, the court concluded that respondents' RICO claim was barred by the McCarran Act. Pet. App. 33a, 57a-64a. On the question of impairment, the district court, citing and relying on *Humana*, reasoned that "applying the RICO Act here * * * would turn on its head the policy balance that the Michigan legislature struck in the [MWCA]" because the MWCA (unlike RICO) does not provide claimants with a judicially enforceable private right of action or permit the recovery of treble damages and attorneys' fees. Pet. App. 62a-63a; see also *id.* at 45a (taking note of Michigan's "significant interest in

safeguarding the policy balance that the legislature struck * * * by ensuring employees' speedy and no-fault recovery of guaranteed compensation for workplace injuries and by shielding employers * * * from liability beyond that which the [MWCA] permits").

3. The Sixth Circuit reversed. Pet. App. 1a-31a. On the issue of impairment, the court first observed that both the MWCA and respondents' RICO claim seek to enforce a similar liability standard – both prohibit the denial of benefits to workers who are entitled to them (with RICO punishing this conduct "if done as part of a pattern of racketeering activity"). Pet. App. 25a. Accordingly, the Sixth Circuit reasoned, "[t]he only aspect of RICO that would arguably impair the [MWCA] is the *difference in remedies* provided for under RICO," which "allows for treble damages and attorneys' fees" whereas the MWCA provides for a daily penalty of $50 after 30 days of delinquency by the employer with a maximum penalty of $1500. Pet. App. 25a-26a (emphasis added). The Sixth Circuit did not acknowledge, much less analyze, the MWCA's creation of an exclusive administrative system for resolving benefits disputes (to replace private rights of action enforceable in judicial proceedings).

Next, the Sixth Circuit purported to draw support from *Humana* for its conclusion that there was no impairment here. Pet. App. 26a-27a. That case, the Sixth Circuit explained, rejected an impairment argument even though directed at a federal law that provided "materially different remedies" from the relevant state laws. *Id.* at 26a.

Finally, the Sixth Circuit attached significance to the fact that the MWCA's prohibition against nonpayment of benefits owed encompasses but is not limited

to the "fraudulent" denial of such benefits. Pet. App. 26a-27a. That feature, the court opined, shows that respondents' RICO suit does not frustrate any "declared" state policy under *Humana* (525 U.S. at 310). The Sixth Circuit also faulted the district court for relying on the impairment of "the WDCA's policy of limited liability for employer," explaining that Michigan has no "policy of limited liability for employers" when "they *fraudulently* deny workers' compensation benefits." Pet. App. 27a (emphasis added).

INTRODUCTION AND SUMMARY OF ARGUMENT

The McCarran Act embodies the federal government's longstanding commitment to preserving the traditional regulatory autonomy of the States over the insurance business. The Act advances this goal by directing that, as a general matter, federal laws not "specifically relate[d] to the business of insurance" (such as RICO) shall not be "construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b). Nevertheless, in this litigation, respondents are attempting to use the hammer of civil RICO – with its treble damages and attorneys' fees remedies – to circumvent the critical limitations on recovery embodied in Michigan's workers' compensation system. Respondents' RICO action also squarely conflicts with the Michigan legislature's decision to replace judicially enforceable private rights of action, with all their attendant expense and uncertainty, with an exclusive and streamlined administrative scheme for resolving all benefit disputes in cases (such as this) not involving intentional torts.

In holding that respondents' RICO action does not impair Michigan's workers' compensation scheme, the Sixth Circuit strayed from this Court's decision in *Humana, Inc.* v. *Forsyth*, 525 U.S. 299 (1999). Far from supporting the Sixth Circuit's conclusions, *Humana* points the other way. Although *amicus* wholeheartedly agrees that both issues presented in the petition are worthy of the Court's review, this brief focuses on the impairment issue. As explained below, further review of that issue is especially warranted for two reasons First, the Sixth Circuit's analysis is squarely at odds, in several important respects, with *Humana*. Second, this case is an excellent vehicle for clarifying the scope of the McCarran Act and certain issues that *Humana* left open.

ARGUMENT

I. The Sixth Circuit's Decision Ignores Or Departs From The Teachings Of *Humana*

As explained above (at 4-6), this Court in *Humana* carefully examined each of the operative terms of the McCarran Act – "invalidate," "supersede," and "impair" – and set forth a general framework for analyzing issues arising under the statute: "When federal law does not directly conflict with state regulation, and when application of the federal law would not [1] frustrate any declared state policy or [2] interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application." 525 U.S. at 309-10 (emphasis added). In addition to identifying two distinct ways (in addition to direct conflicts) in which the McCarran Act would preclude the application of a general federal law to the business of insurance, this Court clearly held that the

term "impairs" extends beyond situations where federal and state law conflict.

Using this analytical framework, the Court in *Humana* proceeded to examine carefully the liability standards, the procedural mechanisms, and the remedies available under Nevada law – and compared them with those available in the policyholders' RICO lawsuit. In so doing, the Court assessed the likely impact of the RICO lawsuit not only on individual Nevada statutes but also on the State's "comprehensive administrative regime" as a whole. 525 U.S. at 311-14.

The Sixth Circuit's decision in this case ignores or departs from *Humana*'s teachings in at least four ways. *First*, the Sixth Circuit focused largely on whether the application of RICO would "frustrate any declared state policy" but made no apparent effort to examine another, recognized way in which RICO could "impair" the MWCA – by "interfering with a State's administrative regime" *as a whole*. *Humana*, 525 U.S. at 309-10. The Sixth Circuit ignored – or overlooked – the fact that this Court conducted just such an analysis in *Humana* itself. See, *e.g.*, 525 U.S. at 311-12 (examining Nevada's "comprehensive administrative scheme" and observing that it is "not hermetically sealed; it does not exclude application of other state laws, statutory or decisional"). As petitioners persuasively demonstrate (Pet. 26), the application of respondents' RICO action would plainly interfere with Michigan's administrative regime for resolving disputes over workers' compensation claims because that regime *was intended to be exclusive*.

Second, the Sixth Circuit applied too narrow a focus in examining whether the application of respondents' RICO suit would "frustrate any declared state

policy." For starters, Michigan's policy of exclusivity in administrative remedies for workers' compensation benefit claims *is* unequivocally expressed in the MWCA. See MICH. COMP. LAWS § 418.131(1) (emphasis added); see also *id.* § 418.841(1). Beyond that, there is no reason for courts to insist upon a formal declaration by the State of its "purposes" in the text of a statute (or an *amicus* brief) as a precondition to full enforcement of the McCarran Act. While such evidence may be helpful in cases where the existence of a state policy is disputed, there is no reason why courts cannot examine and identify state policies as embodied in legislation just as they do in other cases of statutory construction. Had the Sixth Circuit grasped this point, it would have realized that the district court was correct to conclude that "applying the RICO Act here * * * would turn on its head the policy balance that the Michigan legislature struck in the [MWCA]" because the MWCA (unlike RICO) does not provide claimants with a judicially enforceable private right of action or permit the recovery of treble damages and attorneys' fees. Pet. App. 62a-63a.

Third, the Sixth Circuit failed to conduct a careful, independent examination of state law as a predicate to its impairment analysis, even though *Humana* makes clear that such an examination is essential to a meaningful comparison of the relevant state and federal standards of conduct, procedural mechanisms, and remedies. See Pet. 24, 25-28. Specifically, the Sixth Circuit apparently failed to grasp that Michigan law does not recognize any private right of action or judicially cognizable claim based on the intentional withholding of workers' compensation benefits. See Pet. 27-28 (citing cases). As explained above (at 6-8), a major objective of the MWCA was to *replace* judicial proceed-

ings based on tort law with a compensation scheme in which disputes would be handled administratively.

Fourth, the Sixth Circuit understood *Humana* as supporting its holding that there was no impairment here because, in its view, the *Humana* Court rejected an impairment argument even though directed at a federal law that provided "materially different remedies" from the relevant Nevada laws. Pet. App. 26a-27a (quoting the *Humana* Court's paraphrasing of the question granted review, 525 U.S. at 305). But that characterization overlooks the *Humana* Court's *analysis*, which turned on the *lack of material differences* in the remedies actually provided by Nevada law and the RICO suit at issue there.

Whether viewed as inconsistencies with this Court's teachings in *Humana*, or simply as reasons why the decision below is wrong, these aspects of the Sixth Circuit's decision demonstrate why this Court's intervention is needed.

II. This Case Represents An Ideal Vehicle For Resolving Issues Left Open In *Humana* And Clarifying The Scope Of The McCarran Act

Humana turned out to be an exceedingly easy case to resolve under the legal framework announced by the Court in that case. The reason is straightforward: The standards of conduct, procedures, and remedies involved in the underlying RICO lawsuit in *Humana* were all strikingly similar to the substantive standards, procedures, and remedies available under Nevada law. See 525 U.S. at 311-14. Federal and state regimes both prescribed exactly the same standard of conduct (prohibiting fraud by an insurer against a policyholder). Moreover, both regimes contemplated

private civil actions as a means of targeting the proscribed conduct. And both regimes allowed the recovery of extraordinary damages. While RICO authorizes private parties to recover treble damages (18 U.S.C. § 1964(c)), Nevada law authorized the recovery of punitive damages (including in excess of three times compensatory damages).

Given these similarities, this Court had no difficulty concluding that Nevada's approach to policing insurance fraud was in no way frustrated – but instead was "complement[ed]" and "advance[d]" (525 U.S. at 313-14) – by allowing the RICO action to proceed. Precisely because *Humana* turned out to be such an easy case to resolve against McCarran Act preclusion, it left important questions unresolved about the reach of Section 2(b) and the meaning of "impairment." More specifically, and contrary to the Sixth Circuit's suggestion, this Court had no occasion in *Humana* to explain when truly material differences in federal and state procedural mechanisms or available remedies would rise to the level of an "interfere[nce] with a State's administrative regime" under the McCarran Act. 525 U.S. at 310.

This case is an ideal vehicle for addressing this question and, in so doing, bringing greater clarity and uniformity to this important area of federal law. In contrast to *Humana*, the federal-state differences in this case – in terms of both procedural mechanisms and available remedies – are substantial.

1. *Procedural Mechanisms.* Michigan law does not recognize a private right of action to challenge an employer's fraudulent denial of workers' compensation benefits. See Pet. 27-28 & n.8 (citing cases). Instead, under Michigan law respondents' remedy in this

connection is "the filing of a petition for a hearing with the Bureau of Workers' Disability Compensation." *Lisecki* v. *Taco Bell Restaurants*, 389 N.W.2d 173, 175 (Mich. Ct. App. 1986) (per curiam). As explained above, the MWCA sets forth a streamlined administrative system for resolving disputes over workers' compensation benefits that, with respect to non-intentional injuries (as here), is intended to be *exclusive*. Indeed, a bedrock feature of the Michigan system is that it was intended to *replace* judicially enforceable tort-law remedies with administrative procedures and remedies. In this way, Michigan has decided to limit the power of the state courts – and certainly of juries – to sit in judgment on disputes over workers' compensation benefits.

Where, as here, a State has chosen to resolve claims through an administrative process that is meant to replace private civil suits, a federal RICO lawsuit challenging the denial of benefits plainly interferes with, and necessarily weakens, the State's administrative scheme. In effect, a lay jury or federal judge in respondents' RICO suit will be asked to apply federal law to evaluate – and second-guess – the determinations made by workers' compensation magistrates in benefit proceedings. Tellingly, five of the six respondents had claims for benefits *pending before the Workers' Disability Compensation Bureau* at the time they filed their RICO claim. See Pet. App. 36a-37a. In this circumstance, the superimposition of a RICO lawsuit represents a direct federal intrusion into regulatory prerogatives that the McCarran Act reserves to the States.

It was for this reason that the *Humana* Court placed importance on the fact that Nevada *did provide*

a private right of action for insurance fraud claims – under *both* the Nevada Unfair Insurance Practices Act *and* Nevada common law. Here, by contrast, there is an *absence* of a judicially enforceable right of action under state law analogous to the federal suit. Private federal lawsuits in this setting strip the States of their ability to set enforcement priorities through the exercise of prosecutorial discretion and encourage citizens to bypass the state administrative process. This represents a fundamental shift in the nature and quality of insurance regulation, which implicates the core concerns of the McCarran Act.

Moreover, since *Humana*, many courts that have confronted the question whether federal lawsuits "impair" state insurance regimes that do not allow for private rights of action to challenge insurer conduct have disagreed with the position taken by the Sixth Circuit in this case. See, *e.g.*, *LaBarre* v. *Credit Acceptance Corp.*, 175 F.3d 640, 643 (8th Cir. 1999) (RICO claim preempted by the McCarran Act because Minnesota insurance law allowed only "administrative recourse" and not a private civil action); *In re Managed Care Litigation*, 185 F. Supp.2d 1310, 1321 (S.D. Fla. 2002), 150 F. Supp. 2d 1330, 1340 (S.D. Fla. 2001) (RICO claims barred by the McCarran Act where analogous state insurance regime offered no private right of action); *Wineinger* v. *United Healthcare Ins. Co.*, 2000 WL 1277629, at *7-8 (D. Neb. Feb. 16, 2000) (same). This Court's grant of review in this case would allow clarification of this important subsidiary question and resolve the split created by the Sixth Circuit's flawed decision.

2. *The Remedies.* The *second* important divergence between federal and state law in this case

concerns the expansive remedies that respondents are seeking: treble damages and attorneys' fees. In contrast, the MWCA allows an employee to recover the wrongfully withheld benefits. Beyond that, the MWCA provides only for a daily penalty of $50 after 30 days of delinquency by the employer, with a maximum penalty of $1500. Pet. App. 25a-26a; MICH. COMP. LAWS §§ 418.201-418.205, 418.801(2) (penalties, capped at $1500, for nonpayment of benefits). Because the divergence of remedies here is vastly greater than in *Humana*, this case presents the Court with a valuable opportunity to clarify the circumstances in which remedial differences – alone or in combination with significant procedural differences – can rise to the level of an impairment under the McCarran Act.

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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